IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-887

AMERICAN PARTY OF TEXAS, ET AL.,
Appellants

v.

BOB BULLOCK,
Appellee

NO. 72-942

ROBERT HAINSWORTH,
Appellant

v.

MARK WHITE, JR., Secretary of State of Texas,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR APPELLEE

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

J. C. DAVIS
Assistant Attorney General

SAM L. JONES, JR.
Assistant Attorney General
Box 12548, Capitol Station
Austin, Texas 78711
ATTORNEYS FOR APPELLEE

INDEX OF AUTHORITIES

Other Authorities:

Texas Election Code:
Art. 13.45(2)
Art. 13.50
Art. 13.47a
Art. 6.02
Art. 13.09(b)
Art. 13.11a
Art. 13.08c-1
Art. 1.03(2)

Texas Constitution:
Art. III, Sec. 44

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-887

AMERICAN PARTY OF TEXAS, ET AL.,
Appellants

v.

BOB BULLOCK,
Appellee

NO. 72-942

ROBERT HAINSWORTH,
Appellant

v.

MARK WHITE, JR., Secretary of State of Texas,
Appellee

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR APPELLEE

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

NOW COMES Appellee, The Secretary of State of Texas, Mark White, Jr., who succeeded Bob Bullock, former Secretary of State of Texas, and files Brief for Appellee in response to Appellants Briefs filed by Appellants

a. The American Party of Texas,
b. The Texas New Party and the Texas Socialist Workers Party, and
c. Laurel N. Dunn, et al. in Cause No. 72-887 in the Supreme Court of the United States, October Term, 1972, and
d. Robert W. Hainsworth in Cause No. 72-942, in the Supreme Court of the United States, October Term, 1972,

and would show this Honorable Court as follows:

PRELIMINARY STATEMENT

The above Appellants are minor political parties and individuals desiring to run for public office as independent candidates. They seek to have this Court declare that certain provisions of the Texas Election Code which are statewide in application are unconstitutional as violating the First and Fourteenth Amendments to the United States Constitution by infringing on the right of association, free speech, equal protection and due process.

The cases were consolidated for hearings and trial by an Order issued by the Chief Judge of the United States Court of Appeals for the 5th Circuit on July 28, 1972, which consolidated *Raza Unida Party, et al., v. Bob Bullock*, SA-72-CA-158; *American Party of Texas, et al. v. Bob Bullock*, No. 72-CA-50; *Texas New Party, et al. v. Preston Smith, Governor and Bob Bullock*, CA-72-H-990, in the United States District Court for the Western District of Texas, San Antonio Division, and ordered the empaneling of a Three-Judge District Court. The consolidated cases were set for trial on the merits for September 7, 1972, in United States District Court for the Western District of Texas in San Antonio. The stipulations of fact were agreed upon and filed in the above respective consolidated cases on August 31, 1972.

Robert Hainsworth v. Bob Bullock, Civil Action No. A 72-CA-111 was filed in the United States District Court for the Western District of Texas at Austin and ordered by Chief Judge Brown to be consolidated for trial on September 7, 1972, with the above like cases but Defendant Bob Bullock was not served soon enough to answer same, but Robert Hainsworth appeared and his case was heard along with the other consolidated cases and additional pleadings and briefs were allowed to be filed in the Hainsworth case.

OPINIONS BELOW

A Three-Judge Federal District Court was convened for trial of all of the consolidated cases in United States District Court in San Antonio on September 7, 1972, and on September 15, 1972, a memorandum opinion and order was entered by the Court dismissing each of the four cases first consolidated (not the Hainsworth case) and denying

all relief requested in the Complaints. All Temporary Restraining Orders which had been previously granted extending the time to gather signatures on nominating petitions beyond statutory time were dissolved. (The District Court Opinion and Order is printed at 349 F.Supp. 1272 and may be found in the Appendix A at page 17 of Petitioners Jurisdictional Statement).

The Memorandum Order and Judgment in *Hainsworth v. Bullock*, Civil Action No. A 72-CA-111 was entered by the Court on September 19, 1972, dismissing the Complaint. [The Memorandum Order and Judgment is contained in Petitioners Jurisdictional Statement in the Appendix thereto at pages 11 and 12. Portions of Memorandum Opinion and Order Denying Motion for Rehearing are set out in Appendix to Jurisdictional Statement at pages 13 through 18 and 19 through 21].

Notices of Appeal were given by all parties except Raza Unida Party and the Record and Jurisdictional Statement was docketed in this Court for all cases except Hainsworth under the *American Party of Texas v. Bob Bullock*, on December 15, 1972, in the Supreme Court of the United States, October Term, 1972, No. 72-887. Said Record and Jurisdictional Statement was docketed in this Court for *Robert Hainsworth v. Mark White* on December 30, 1972, in the Supreme Court of the United States, October Term, 1972, No. 72-942.

This Court granted Appellee's request to file a joint Motion to Dismiss or Affirm and also a joint Appellee's Brief herein.

Hainsworth, independent candidate representing himself, who challenge the constitutionality of Article 13.50 of the Texas Election Code applying to independent candidates.

ARGUMENT AND AUTHORITIES

The Memorandum Opinion of the Three-Judge District Court is reported as *Raza Unida Party v. Bullock*, 349 F.Supp. 1272 (W.D. Tex. 1972) and is reproduced in the Jurisdictional Statement of the Appellants in Cause No. 72-887 at pages 17-36 filed in this Court. In *Hainsworth v. Bullock*, the Memorandum Order and Judgment of the same Three-Judge Court is found on page 11 of the Jurisdictional Statement in Cause No. 72-942 filed in this Court.

Appellee, the present Secretary of State of Texas, Mark White, Jr., relies upon the holding, the reasoning, and the authorities cited in the Memorandum Opinion first referred to above reproduced in the Jurisdictional Statement at pages 17-36 of the Appellants in Cause No. 72-887. Quoted from the Opinion at Page 19 is the basic holding in both causes:

> "This is another one of those cases where we as Judges are expected to don the 'awesome mantle of omnipotence and unerring clairvoyance' to determine if Texas legislation operates to unconstitutionally burden the rights of voters, political parties, and their candidates. While the Supreme Court of the United States has delineated on the extreme end of the spectrum those combinations of restrictions which unconstitutionally impede the election process and those on the other end which do not, this case presents a new combination which falls squarely in the middle. Because we believe that courts should

QUESTIONS PRESENTED

The Briefs of the different Appellants present different viewpoints and ideas of what the basic questions presented for the consideration of the Court are, but Appellee believes that the following questions clearly present the basic questions which have been raised in each of the Appellants' Briefs for the consideration of this Honorable Court:

1. Are the provisions of Article 13.45(2), which require that before the nominees of any new political party or a political party, whose nominee for governor at the last general election received less than 2% of the total vote cast for governor or a previously existing party which did not have a nominee for governor in the last general election, can be placed upon the general election ballot there must be a showing that the number of people participating in the party's precinct conventions or signing petitions to have the party's nominees on the general election ballot was at least 1% of the vote for governor at the last general election, constitutionally impermissible?

2. Are the provisions of Article 13.45 (2), which prohibit the circulation of the petitions until the day following the primary elections, constitutionally impermissible?

3. Are the provisions of Article 13.45(2), which prohibit a person from signing such petitions who has participated in any other party's primary election or convention during the current voting year, constitutionally impermissible?

4. Are the provisions of Article 13.45(2), which require that the signatures on the petitions must be secured and filed with the secretary of state within a 55 day period, constitutionally impermissible?

5. Are the provisions of Article 13.45(2), which require the administering of a prescribed oath to those signing the petitions, constitutionally impermissible as being too burdensome?

6. Whether the McKool-Stroud Primary Financing Bill of 1972 is unconstitutional.

7. Is the requirement that a person file his intention to become a candidate three months in advance of the precinct conventions so burdensome as to be constitutionally impermissiole?

8. Are the provisions of Article 13.50 of the Texas Election Code, which require that the application of an independent candidate for district office have a certain percent of signatures of the total number who voted for governor at last general election in that district but not to exceed 500 signatures, constitutionally impermissible?

9. Are the provisions of Article 13.45(2) of the Texas Election Code, which require that signers of the petitions be currently registered voters, constitutionally impermissible?

THE METHODS PROVIDED IN THE TEXAS ELECTION CODE TO NOMINATE CANDIDATES TO BALLOT FOR GENERAL ELECTION IN TEXAS

Texas, under the Texas Election Code, provides the

to permit a party to be included on the general election ballot, pursuant to the provisions of Article 13.45(2), was approximately 22,000.

The challenge is argued by Appellants that the 1% requirement of Article 13.45(2) is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Appellants, in this connection, seem to rely completely upon the decision in *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). However, it should be noted that in *Williams v. Rhodes*, the percentage involved for ballot position was 15%—not the 1% requirement required in Texas. In addition, in *Williams v. Rhodes*, added to the percentage requirement, were the additional requirements that the signers of the petitions had to have voted for the majority of the party's candidates at the last election or had never voted before, and the delegates elected to the national convention were only eligible if they had not voted in another party's primary election within the last 4 years.

Williams v. Rhodes dealt with a situation where the Court readily recognized that the overall scheme of the Ohio election laws was to deny ballot position to all but the Democratic and Republican parties. In fact, the Court in *Williams v. Rhodes*, even made mention of the lenient 1% requirements found in most of the states. At the time of the decision in *Williams v. Rhodes*, 42 states had requirements of 1% or less and 49 states had requirements of 5% or less.

At this point it would be helpful to review some of the decisions since *Williams v. Rhodes*. In *Socialist Labor Party v. Rhodes*, 318 F.Supp. 1262, appeal dismissed, 31 L.Ed.2d 227, 91 S.Ct. 1161 (1970), a 7% requirement was

JURISDICTION

The necessary jurisdictional requirements were met pursuant to the provisions of 28 U.S.C., Sec. 2281, to require the convening of a three-judge court to determine the issues. However, it is questioned by Appellee that any substantial federal question is presented for adjudication by the Supreme Court of the United States which have not been previously resolved by this Honorable Court.

Furthermore, Appellee contends that the Memorandum Opinions, Judgments and Orders entered by the Three-Judge Court in these causes should be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

CONSTITUTIONAL PROVISIONS

The First and Fourteenth Amendments to the United States Constitution are the constitutional provisions relied upon by Plaintiffs in trial before the Three-Judge Court.

STATUTES INVOLVED

Pertinent provisions of the *Texas Election Code* involved are as follows:

1. Article 13.45(2)
2. Article 13.50
3. Article 13.47a
4. Article 6.02
5. Article 13.09(b)
6. Article 13.11a
7. Article 13.08c-1

exercise restraint in overturning state laws unless clearly unconstitutional, we find that the totality of the Texas Election Code serves a compelling state interest and does not operate to suffocate the election process. Accordingly, we deny all relief requested by plaintiffs."

The Raza Unida Party and the Socialist Workers both were able to meet all requirements of Article 13.45(2) of the Texas Election Code and both were certified by the Secretary of State of Texas to be placed on the ballot for the November general election on August 8, 1972.

The Three-Judge Court in the Memorandum Opinion entered in San Antonio on September 15, 1972, found that the Raza Unida Party and the Texas Socialist Workers Party now lack the requisite "personal stake in the outcome" necessary to preserve jurisdiction in this Court. *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968).

The Raza Unida Party did not appeal. It is the position of Appellee that Appellant Socialist Workers Party now lacks the requisite personal stake in the outcome of this appeal and should be dismissed, and Appellee so moves.

1. ARE THE PROVISIONS OF ARTICLE 13.45(2), WHICH REQUIRE THAT BEFORE THE NOMINEES OF ANY NEW POLITICAL PARTY OR A POLITICAL PARTY, WHOSE NOMINEE FOR GOVERNOR AT THE LAST GENERAL ELECTION RECEIVES LESS THAN 2% OF THE TOTAL VOTE CAST FOR GOVERNOR OR A PREVIOUSLY EXISTING PARTY WHICH DID NOT HAVE A NOMINEE FOR GOVERNOR IN THE LAST GENERAL ELECTION, CAN BE PLACED UPON THE GENERAL ELECTION

BALLOT THERE MUST BE A SHOWING THAT THE NUMBER OF PEOPLE PARTICIPATING IN THE PARTY'S PRECINCT CONVENTIONS OR SIGNING PETITIONS TO HAVE THE PARTY'S NOMINEES ON THE GENERAL ELECTION BALLOT WAS AT LEAST 1% OF THE VOTE FOR GOVERNOR AT THE LAST GENERAL ELECTION, CONSTITUTIONALLY IMPERMISSIBLE?

Even though the Raza Unida Party and the Texas Socialist Workers Party met all of the provisions of Article 13.45(2) and were certified by the Secretary of State to be on the November, 1972, general election ballot, Appellants are still challenging the provisions of Article 13.45(2) of the Texas Election Code, which require that before the nominees of (1) any new political party, (2) or a political party whose nominee for governor at the last general election received less than 2% of the total vote cast for governor, (3) or a previously existing party which did not have a nominee for governor in the last general election, can be placed upon the general election ballot there must be filed with the Secretary of State a list of the participants in precinct conventions held by the party in an aggregate number of at least 1% of the total votes cast for governor at the last general election, or if that number is less than 1%, there must be filed with the precinct convention lists petitions requesting that the party's nominees be placed upon the general election ballot which are signed by a sufficient number of qualified voters to make a combined total of at least 1% of the total vote cast for governor at the last general election.

For the election year 1972, the number of qualified voters attending precinct conventions or signing petitions

following four alternative methods of nominating candidates to the ballot for a general election:

1. Candidates of parties whose gubernatorial candidate polled more than 200,000 votes in the last general election, may be nominated by primary election only.

2. Candidates of parties whose candidate polled less than 200,000 votes, but more than 2% of the total vote cast for governor, may be nominated by primary election only.

3. Candidates of parties whose candidates polled less than 2% of the total gubernatorial vote in the last general election, and parties who did not have a nominee for governor in the last general election, may be nominated by convention only, or by fulfilling additional requirements set out in Article 13.45(2) of the Texas Election Code.

4. Nonpartisan and independent candidates' names may be printed on the ballot after fulfilling the qualifications set out in Article 13.50 of the Texas Election Code.

In the consolidated cases tried before the Three-Judge Court in San Antonio on September 7, 1972, Plaintiffs Raza Unida Party (not an Appellant), the American Party of Texas, the Socialist Workers Party, and the Texas New Party all fall into the above third category. Therefore, the thrust of the three Appellants' attack goes to the constitutionality of Article 13.45(2) of the Texas Election Code.

The other Appellants are Laurel N. Dunn, representing himself and other independent candidates, and Robert

held invalid. However, in *Wood v. Putterman*, 316 F.Supp. 646, affirmed 400 U.S. 859, 91 S.Ct. 104, 27 L.Ed.2d 99 (1970), a 3% requirement was upheld, wherein the Court stated that:

> "... The limitation of easier access to the ballot to parties which have demonstrated active participation and some measure of success at the last preceding general election does not seem an unreasonable safeguard against these undesirable consequences, especially when the petition procedure by which a new political party may gain access to the ballot is not particularly onerous. ..."

In the case of *Jones v. Hare*, 440 F.2d 685 (1971), the challenged statute was upheld which required 1% of the total vote cast for the successful candidate for Secretary of State at the last general election. The Court in its opinion stated that:

> "The Michigan Election Law does provide an official ballot listing as a matter of right for the candidates of political parties which have polled over a certain minimal amount of votes in the last regularly scheduled general election ... any other person may be placed upon the ballot who receives the signatures of at least one percent of the votes cast for the successful candidate for Secretary of State in the last preceding election. As part of the process the Michigan laws impose certain reasonable time limitations and procedural steps including the nominal formation of a so-called 'political party.' We find that each of these requirements is a reasonable attempt by the State of Michigan to provide ready access to its official ballot to any person who has the support of a minimally significant number of qualified voters. ..."

In *Lyons v. Davoren*, 402 F.2d 890, cert.denied, 393 U.S. 1081, 89 S.Ct. 861, 21 L.Ed.2d 774 (1968), a 3% requirement of the total votes cast in the last gubernatorial election to get on the general election ballot was upheld. In *Moore v. Board of Elections for District of Columbia*, 319 F.Supp. 437 (1970), a 2% requirement was upheld, and the Court stated in its opinion that:

> "... Congress properly recognized the need to limit candidates' access to the ballot through a process of petitions, primaries, and runoffs in order to minimize confusion and ensure that voters in the final election are presented only with candidates who have substantial support in the community. In fashioning such a process, Congress had to establish some balance between the competing goals of guaranteeing access to the ballot by qualified candidates, and limiting the field of candidates in the general election to a manageable number. The Court may not substitute its own judgment for that of Congress in determining the optimum resolution of these factors, but must inquire only whether the provisions ... place unreasonable restrictions on independent candidates or arbitrarily discriminate against indigents in favor of candidates from major parties. ..."

Lastly, in *Jenness v. Fortson*, 403 U.S. 431 (1971), and *Jackson v. Ogilvie*, 325 F.Supp. 861, affirmed 403 U.S. 925 (1971), a 5% requirement for ballot position was upheld.

A review of the foregoing cases makes it most clear that the Appellants' allegation that the 1% requirement in Texas, pursuant to the provisions of Article 13.45(2), for ballot position for nominees of a new or relatively small political party is constitutionally impermissible, is com-

pletely lacking in merit. Only when the percentage requirement has risen to 15% and 7%, have the courts struck the enactments down. In turn, on numerous occasions the courts have upheld, as constitutionally valid, percentage requirements ranging from 1% to 5%. Even in the landmark case of *Williams v. Rhodes*, the Court noted the lenient 1% requirements of the vast majority of the states.

Certainly, there is nothing constitutionally impermissible about the requirements of Article 13.45(2) of the Texas Election Code which provide that certain new, small or inactive political parties have to show some minimal support of the voters before being entitled to have their nominees placed upon the general election ballot. Nothing in *Williams v. Rhodes*, or the cases which have followed indicate that the minimal 1% requirement in Texas places an unconstitutional burden on the right to vote or to freely associate.

2. ARE THE PROVISIONS OF ARTICLE 13.45(2) WHICH PROHIBIT THE CIRCULATION OF THE PETITIONS UNTIL THE DAY FOLLOWING THE PRIMARY ELECTIONS CONSTITUTIONALLY IMPERMISSIBLE?

The Appellants have next challenged those provisions of Article 13.45(2) of the Texas Election Code, which require that the petitions for signatures to place a party's nominees on the general election ballot cannot be circulated for signatures until the day after the primary elections are held.

First, let us consider some of the practical reasons for such a requirement. If the party seeking a ballot position is

an active one with even minimal voter support, their precinct convention attendance should satisfy, or come close to satisfying, the 1% requirement. As these precinct conventions are also held on the same day that the primary elections are being held each party would have an equal opportunity to attract the voter to its political process—be it precinct convention or primary election. As there would be no need for the circulating of petitions if the precinct conventions obtain the required 1% participation it would seem to logically follow that the circulating of petitions should be delayed until after the precinct conventions. This would not only encourage voter participation in the party's general affairs but would also have the voter participate in the party's nomination of candidates. The petitions are merely a way in which a party may supplement its precinct convention attendance if it falls below the 1% requirement. To allow it to commence prior to the precinct conventions would not only discourage voter participation in the vital business of the precinct convention, but it would be doing a useless thing if the attendance at the precinct conventions equaled or exceeded the 1% requirement.

In addition, there are other reasons for requiring that petitions not be circulated until after the precinct conventions and primary elections. If the petitions are circulated well in advance of the precinct conventions and primary elections, the political issues and the political stands of the various parties may not have crystallized or taken shape and should a voter sign a petition at this time he would become fenced in to the extent that he could not change his mind and participate in the political process of another party more to his liking. Also, by delaying the petition circulating process until after the primary elections there is a great deal less likelihood that individual voters will

become engaged in the party process of more than one political party. A petition signed well in advance of primary elections and precinct conventions may be forgotten or its significance ignored.

The entire purpose of the petition process is merely to supplement any deficiency in the percentage requirement of the precinct convention attendance, and to allow its commencement prior to the primary elections and precinct conventions is to ignore the very reason for its very existence.

That such an arrangement does no violence to the Constitution of the United States is evident by the decision in *Moore v. Board of Elections for District of Columbia*, 319 F.Supp. 437 (1970), where a challenged statute was upheld against assertions that:

> "... complaint points to the fact that independent candidates must obtain more signatures for nomination than primary candidates; *that they must solicit signatures later than primary candidates*; and that they may be foreclosed from obtaining signatures from registered voters who have already signed a nimination petition for a primary candidate. ..." (Emphasis added).

The use of petitions to meet the 1% requirement of Article 13.45(2) is a supplemental assistance for small or new parties seeking a ballot position for their nominees—not a detriment or obstacle as Appellants would suggest.

3. ARE THE PROVISIONS OF ARTICLE 13.45(2) WHICH PROHIBIT A PERSON FROM SIGNING SUCH PETITIONS WHO HAS PARTICIPATED IN ANY OTHER PARTY'S PRIMARY ELEC-

TION OR CONVENTION DURING THE CURRENT VOTING YEAR, CONSTITUTIONALLY IMPERMISSIBLE?

Article 13.45(2) prohibits a person from the signing of the petition to obtain ballot position for a political party if such person has participated in another party's primary election during the current voting year. The Appellants have seemingly taken the position that this requirement in some way conflicts with the decisions in *Williams v. Rhodes*, and *Jenness v. Fortson*, 403 U.S. 431 (1971). However, in *Williams v. Rhodes*, the restriction upon dual party participation extended beyond the current voting year, and made the transfer of party loyalty extremely difficult if not impossible for small or new parties. In Texas, however, no such lingering restriction exists and a voter may change from year to year his participation in party activity. In *Jenness v. Fortson*, the Court merely mentioned that in Georgia a voter could sign the petitions of more than one political party in a given voting year, but certainly did not indicate that this was some sort of constitutional right or that such action was proper.

Of extreme importance in this connection is the case of *Jackson v. Ogilvie*, 325 F.Supp. 861, affirmed, 403 U.S. 925 (1971), which was affirmed by the Supreme Court on the same day as its decision in *Jenness v. Fortson*. The Court in *Jackson v. Ogilvie* had before it the same issue as here in connection with state statutes prohibiting participation by voters in more than one political party's election process, and the Court held in its opinion that:

> "... *Baker* requires that one elector must have one vote. Under the Illinois Election Code an elector is offered an option. He may sign a petition for an

independent candidate. If he signs such a petition he is not qualified to vote in a primary election for a candidate seeking the same office as the independent who he supports . . . Thus, the state's scheme attempts to insure that each qualified elector may in fact exercise the political franchise. He may exercise it either by vote or by signing a nominating petition. *He cannot have it both ways.* Such a requirement seems not only fair but mandatory under the holding in Baker v. Carr. . . . " (Emphasis added).

In the case of *Lester v. Board of Elections for District of Columbia*, 319 F.Supp. 505 (1970), the Court held:

" . . . The Court's decision, however, does not touch the requirement prohibiting registration thirty days prior to the election. . . This period of time is necessary for administrative tidiness, to insure the purity of the vote *and to prevent dual registration and dual voting.* . . . " (Emphasis added).

In the case of *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, affirmed 91 S.Ct. 65, 400 U.S. 806, 27 L.Ed.2d 38 (1970), the Court held that:

" . . . that portion of Section 138 which discounts the signature of a voter who has voted at a primary election which a candidate was nominated for an office for which the nominating petition purports to nominate another candidate, *can be justified by the compelling State interest* to preserve inviolate the sanctity and secrecy of the ballot. Since the State cannot determine which candidate a particular voter selects in the primary or whether he has in fact selected only some of the proffered candidates, this provision can be justified under the percent teachings of the Supreme Court . . . The purpose of Section

138(6) is to limit each voter to but a single choice for office . . . a permissible State interest in assuring that each independent party is supported by 12,000 *different* qualified voters. . . . " (Emphasis added).

See also *Wood v. Putterman*, 316 F.Supp. 646, affirmed 91 S.Ct. 104, 400 U.S. 859, 27 L.Ed.2d 99 (1970), and *Moore v. Board of Elections for District of Columbia, supra.*, where similar provisions were upheld.

The recent cases of *Rosario v. Rockefeller*, 258 F.2d 649 (1972) and *Pontikes v. Kusper*, 40 L.W. 2648 (1972–March 7), have also dealt with this issue. In *Pontikes*, the state laws provided for a prohibition against voting in a primary election if the voter had voted in another party's primary in the last 23 months–a situation more akin to *Williams v. Rhodes* than the requirements of Article 13.45(2) enacted by the Legislature of Texas. The Court in *Pontikes* commented upon the state's interest in the prevention of "raiding" in the political party process of the state but felt that the method to prevent this was too broad in operation–it impeded both deceptive conduct and constitutionality protected activities.

In *Rosario*, a more limited "raiding" statute, similar to that of Texas, was upheld. The Court noted in *Rosario* that the political parties of the United States stand as deliberate associations of individuals drawn together to advance certain common aims by nominating and electing candidates who will pursue those aims once in office, and that the entire political process in this country depends largely upon the satisfactory operation of these institutions. The Court felt that the efficiency of the party system in a democratic process would be seriously impaired if members of one party were entitled to interfere and participate in opposite party's affairs.

In the instant case, there is a complete lack of the broad sweeping restriction found in *Williams v. Rhodes* and *Pontiles v. Kusper*. The only restriction is one of giving the voter an option during the current election year—that of deciding which particular political party he wished to support and participate with—an option or restriction upheld as not only a valid but a compelling state interest by *Jackson v. Ogilvie, Socialist Workers Party v. Rockefeller, Wood v. Putterman, Moore v. Board of Elections for District of Columbia,* and *Rosario v. Rockefeller.*

4. ARE THE PROVISIONS OF ARTICLE 13.45(2) WHICH REQUIRE THAT THE SIGNATURES ON THE PETITIONS MUST BE SECURED AND FILED WITH THE SECRETARY OF STATE WITHIN A 55 DAY PERIOD, CONSTITUTIONALLY IMPERMISSIBLE?

The Appellants have also challenged the time limit specified by Article 13.45(2) for the obtaining of signatures on the petitions and such petitions being filed with the Secretary of State. Under the provisions of Article 13.45(2), a period of approximately 55 days is allowed to circulate and obtain signatures upon the petitions and file them with the Secretary of State. As noted by Appellants, this process must be completed approximately 90 days prior to the general election in November.

Appellants' challenge is based entirely upon the desire to have the 55 day period extended, and presumably to a date nearer the general election date.

Appellants have seemingly ignored some of the basic reasoning behind the provisions they have challenged. First, as has been discussed previously, the use of petitions

is merely a manner provided to supplement the obtaining of the required percentage at the precinct conventions. An active, going political party should be able to obtain, or nearly so, the 1% requirement by attendance at its precinct convention. A failure to obtain the minimal 1% requirement at precinct conventions, and in the 55 days thereafter by the circulating of petitions, would merely be a significant indication that the political party involved lacked voter support or initiative.

Also, the checking of the petitions is a difficult and time consuming task which must be complete in sufficient time to allow not only the printing of the ballot, but any legal contests which might arise in connection with the Secretary of State certifying or denying certification on the ballot of a particular political party. In this connection Article 1.03(2) of the Texas Election Code requires the Secretary of State to certify the candidates nominated for office to the county clerks at least 30 days prior to the general election. Because of the necessity for taking printing bids for the ballots, the foregoing is a duty which is normally attempted to be performed well in advance of the 30 day period specified.

Aside from the foregoing justifications, the decisions of the courts give little encouragement to Appellants' position. In *Moore v. Board of Elections for the District of Columbia*, 319 F.Supp. 437 (1970), the Court upheld a statute which allowed only 54 days to obtain the required signatures on a similar type petition.

In *Tansley v. Grasso*, 315 F.Supp. 513, affirmed 91 S.Ct. 927, 401 U.S. 928, 28 L.Ed.2d 210 (1970), the Court stated:

"State statutes validly enacted are presumed to be constitutional . . . It is the plaintiffs' burden, if they are to prevail, to demonstrate the invidious discrimination they have alleged. . . .

" . . .

" . . . The state has an interest in not having wide open primaries, wherein anyone can run who so desires. Such a procedure would lead to excessive cost and confusion, without any showing that the contestant had a substantial, or even any support within his own party . . . The state does have an interest in maintaining the integrity and stability of existing political parties, thus encouraging responsbile action on their part. . . .

" . . .

" . . . The present case deals with that type of minor difference which *Williams* does not proscribe. The states have broad discretion in formulating election policies. Williams v. Rhodes, supra, at 34, 89 S.Ct. 5; United States v. Classic, 313 U.S. 299, 311, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941); Voorhes v. Dempsey, 231 F.Supp. 975, 977 (D.Conn. 1964) (three-judge court). The statutes herein challenged represent a valid exercise of that discretion. It may well be that the plaintiffs have strong feelings that this legislative distinction creates an unnecessary burden upon prospective candidates for public office, however, if their claim has any merit their proper forum is before the state legislature. The Plaintiffs have shown no invidious discrimination. . . . "

In *Briscoe v. Kusper*, 435 F.2d 890 (1970), the Court stated in its opinion:

" . . . A state clearly has a substantial interest in

administering its own local elections. This state concern reasonably includes regulation of candidates, and it may well call for limitations on access to ballots by those seeking public office. Such limitations may be justified by the need to prevent subversion or corruption. In this instance, the chief purpose of the limitation is to reduce the electoral process to manageable proportions by confining ballot positions to a relatively small number of candidates who have demonstrated initiative and at least a minimal appeal to eligible voters. . . . "

In *Socialist Workers Party v. Rockefeller*, 314 F.Supp. 984, affirmed 91 S.Ct. 65, 400 U.S. 806, 27 L.Ed.2d 38 (1970), the Court held that:

" . . . the State is not powerless to fix reasonable standards or requirements for a position on the ballot so that multifarious political associations with little or no popular support do not bemuse the electoral process. The use of nominating petitions by independent political parties to obtain a place on the ballot has long been recognized as an example of such a reasonable requirement for obtaining a ballot position and as an integral part of the election process. . . . "

In *Wood v. Putterman*, 316 F.Supp. 646, affirmed 91 S.Ct. 104, 400 U.S. 859, 27 L.Ed.2d 99 (1970), the Court stated:

" . . . The limitation of easier access to the ballot to parties which have demonstrated active participation and some measure of success at the last preceding general election does not seem an unreasonable safeguard against these undesirable consequences, especially when the petition procedure by

which a new political party may gain access to the ballot is not particularly onerous. . . . "

In *Jones v. Hare*, 440 F.2d 685 (1971), it is stated that:

"... As part of the process the Michigan laws impose certain reasonable *time limitations and procedural steps* ... We think that each of these requirements is a reasonable attempt by the State of Michigan to provide ready access to its official ballot to any person who has the support of a minimally significant number of qualified voters. . . . " (Emphasis added).

The foregoing authorities indicate beyond question that the Appellants' position as to this issue is completely lacking in merit. Besides the administrative and procedural need and justification for such requirement, it in turn serves as an indication of whether the political party seeking a ballot position has at least minimal support among the voters—a purpose recognized on numerous occasions by the Courts since *Williams v. Rhodes* as being both a legitimate and compelling state interest and justification.

5. ARE THE PROVISIONS OF ARTICLE 13.45(2), WHICH REQUIRE THE ADMINISTERING OF A PRESCRIBED OATH TO THOSE SIGNING THE PETITIONS' CONSTITUTIONALLY IMPERMISSIBLE AS BEING TOO BURDENSOME?

It is somewhat difficult to ascertain just what objection the Appellants are making in connection with the requirements of Article 13.45(2) as concerns the administering of a prescribed oath to those signing the petitions. Other than the allegation that it is burdensome, the exact nature of

the complaint is hazy and obscure. The challenged requirement provides that:

> "... To each person who signs the petition there shall be administered the following oath, which shall be reduced to writing and attached to the petition; 'I know the contents of the foregoing petition, requestiong that the names of the nominees of the _____ Party be printed on the ballot for the next general elections. I am a qualified voter at the next general election under the constitution and laws in force, and during the current voting year I have not voted in any primary election or praticipated in any convention held by any other political party.' ...

The foregoing oath could undoubtedly be shortened somewhat, but this avoids the real issue. At what length in verbage did it become constitutionally impermissible as Appellants allege? Is the validity of a statutory enactment of the Legislature of the State of Texas to fall before some vague constitutional mandate demanding terseness? Possibly such questions prompted the Court's statement in *Valenti v. Rockefeller*, 292 F.Supp. 851, affirmed 89 S.Ct. 689, 393 U.S. 405, 21 L.Ed.2d 635, which is set forth as follows:

> "... We are aware of the importance of the right to vote in this country's general scheme of constitutional government. See Williams v. Rhodes ... We are also aware of the basic principle of federalism which requires that a federal court exercise great caution before striking down a state statute as repugnant to the Constitution. ..."

It is impossible to ascertain if the Appellants also object to the necessity of the signatures to the petitions being

sworn to, but in any event, this argument or position would be as lacking in merit as the foregoing and for the same reason. In addition, the notion that the United States Constitution empowers the federal court to judge the wisdom of the means by which a state undertakes to further legitimate interest has long been rejected by the United States Supreme Court. Federal courts are not empowered to sit as a "super-legislature to determine the wisdom, need and propriety of laws." *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77 (1876). The United States Constitution does not give the federal courts the power to judge the wisdom of the legislative choice and turn the court's disagreement with that choice into a constitutional prohibition. *Beauharnias v. Illinois*, 343 U.S. 250, 72 S.Ct. 725 (1952); *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 653 (1955).

6. WHETHER THE McKOOL-STROUD PRIMARY FINANCING BILL OF 1972 IS UNCONSTITUTIONAL?

One of the groups of Appellants in this proceeding has raised the issue of whether the McKool-Stroud Primary Financing Bill of 1972 is unconstitutional and invalid. In the trial brief filed by this group of Appellants in connection with this issue, the sole challenge to this statutory enactment by the Legislature of the State of Texas is that it is " . . . void and unconstitutional under the Texas Constitution."

If this group of Appellants wish to raise a question dealing with the validity of the enactment upon State constitutional grounds, then Appellees respectfully submit that they have chosen the wrong forum. The state courts of Texas are the proper tribunal to litigate this issue—not the federal courts. It is for the State courts to determine State law—not the federal courts. However, the entire argument of Appellants is answered by *Bullock v. Carter*, 31 L.Ed.2d 92 (1972) and *Bullock v. Calvert*, 480 S.W.2d 367 (Tex.Sup. 1972), and the authorities in these cases. In *Bullock v. Calvert*, The Texas Supreme Court upheld the authority of the Legislature to provide for State financing of party primaries and the McKool-Stroud Primary Financing Law of 1972 was enacted as a direct result of the holding in *Bullock v. Calvert*, as well as *Bullock v. Carter*.

It was recognized by the United States Supreme Court in *Bullock v. Carter* that the State financing of primary elections is a legitimate state objective.

In *Bullock v. Calvert*, the Supreme Court of Texas held that the Constitution of Texas requires legislative authorization and appropriation for the expenditure of public funds for this purpose. The primary financing law here challenged was enacted in order to provide pre-existing law within the meaning of Section 44 of Article III of the Texas Constitution for the expenditure of State funds for the financing of primary elections.

Now for the first time on appeal Appellants challenge the McKool-Stroud Primary Financing Bill of 1972 on the grounds that it is impermissible under the Constitution of the United States upon the grounds that financial assistance is given to those political parties required to hold

U.S. at 32. "Plaintiffs admitted in oral argument that they did not attempt in any way to comply with the provisions of Article 13.50."

Appellant, Robert Hainsworth, an independent candidate for district office makes the same challenge to Article 13.50 of the Texas Election Code in Cause No. 72-942 in the Court. He apparently made an effort to secure the required signatures but fell short of the minimum 500 signatures required due to apparent lack of support.

On page 12 of Appellant Hainsworth's Jurisdictional Statement, Cause 72-942 in this Court, cited from the Three-Judge Court's Memorandum Opinion:

> "For the same reasons stated by us in Raza Unida Party, et al. v. Bob Bullock, et al., supra, this Court finds that Article 13.50 serves a compelling state interest and is not violative of Equal Protection as applied to this Plaintiff."

9. ARE THE PROVISIONS OF ARTICLE 13.45(2) OF THE TEXAS ELECTION CODE, WHICH REQUIRE THAT SIGNERS OF THE PETITIONS BE CURRENTLY REGISTERED VOTERS, CONSTITUTIONALLY IMPERMISSIBLE?

This issue raised by Appellants was recently resolved adversely to Appellants' position in the case of *Gaunt v. Brown*, 40 L.W. 2680 (U.S.D.C. Ohio, decided April 6, 1972). While dealing with a somewhat different situation, that of an individual not being able to register or vote right at the time of the primary elections, the principles would be equally applicable to the issue here presented.

Also in the case of *Socialist Workers Party v. Rocke-*

"... The fact is, of course, that from the point of view of one who aspires to elective public office in Georgia, alternative routes are available to getting his name printed on the ballot. He may enter the primary of a political party, or he may circulate nominating petitions either as an independent candidate or under the sponsorship of a political organization. We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other.

"... We can hardly suppose that a small or a new political organization could seriously urge that its interests would be advanced if it were forced by the State to establish all of the elaborate statewide, county-by-county, organizaitonal paraphernalia required of a 'political party' as a condition for conducting a primary election... there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike a truism will illustrated in Williams v. Rhodes. ..."

Finally, the decision in *Bullock v. Carter* recognizes that the State does not necessarily have to finance all aspects of the election process no matter how small the voter support. The Court in its opinion stated that:

"... the Court has recently upheld the validity of

> a state law distinguishing between political parties on the basis of success in prior elections . . . We are not persuaded that Texas would be faced with an impossible task in distinguishing between political parties *for the purpose of financing primaries. . . .* "

The foregoing was in direct reference to the State's argument that just the type of challenge here presented would result if the State were required to finance the primary election process. The only conclusion that can be drawn from the Coutr's statement is that they anticipated that only those political parties required to engage in the expensive primary elections would receive State financial aid.

Consequently, the Appellees submit that this challenge of Appellants is also lacking in merit.

7. IS THE REQUIREMENT THAT A PERSON FILE HIS INTENTION TO BECOME A CANDIDATE THREE MONTHS IN ADVANCE OF THE PRECINCT CONVENTIONS SO BURDENSOME AS TO BE CONSTITUTIONALLY IMPERMISSIBLE?

The foregoing issue raised by the Appellants has already been determined adversely to Appellants' position in the case of *Socialist Labor Party v. Rhodes*, 318 F.Supp. 1262, appeal dismissed, 31 L.Ed.2d 227, 92 S.Ct. 1161 (1970), where the Court stated:

> " . . . The state has an interest in having persons who otherwise qualify for ballot positions officially become a candidate at a designated time prior to an election. In addition, the state may reasonably require that all persons seeking elective office become

"... It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. ..."

The Three-Judge District Court was correct in finding that the Texas Election Code is not comprised of "an entangling web of election laws" of the type referred to by Mr. Justice Douglas and invalidated in *Williams v. Rhodes*, 393 U.S. at 35.

The Texas Election Code does not operate to "freeze the status quo" since two minority parties met the requirements and were certified to the general election ballot in Texas in 1972.

As the Court stated in conclusion:

"After close scrutinty, this Court cannot say that, in serving its compelling interest, Texas has chosen the way of greater interference in establishing alternative routes to the ballot." *Dunn v. Blumstein*, 405 U.S. at 343.

WHEREFORE, PREMISES CONSIDERED, Appellee, Mark White, Jr., Secretary of State of Texas, prays that this Honorable Court will refust jurisdiction because Appellants have failed to present a substantial federal question which has not been previously decided by this Court, and in the alternative Appellee submits that the allegations raised by Appellants are totally lacking in merit and the relief sought should be denied and the Judgments of the Three-Judge District Court should in all things be affirmed.

primary *elections*, but unavailable to those parties which nominate candidates by *conventions*.

First, one need only look to the decision in *Bullock v. Carter* to ascertain the large expense entailed in conducting a party primary *election*. The printing of ballots, leasing of voting machines, and employment of various election officials on a state-wide basis is a major expenditure for even the State. The appropriation in the McKool-Stroud Primary Financing Bill of 1972 is ample evidence—along with the fact that actual expenditures exceeded the legislative estimate by a considerable amount. However, the convention and petition procedure available for small or new parties carries with it none of the expensive election requirements and there exists no need for expenditures of state funds for political groups which may have little if any voter support. If, however, they reach a size where they are forced to conduct primary *elections* they will, in turn, be the recipients of the State's financial assistance.

That such an arrangement is constitutionally permissible is evidenced by the case of *Jenness v. Fortson*, 403 U.S. 431 (1971), where the United States Supreme Court held that:

> "... any political body that wins as much as 20% support at an election becomes a 'political party' with its attendant ballot position rights *and primary election obligations*, and any 'political party' whose support at the polls falls below that figure reverts to the status of a 'political body' with its attendant nominating petition responsibilities and *freedom from primary election duties*. ...

feller, 314 F.Supp. 984, affirmed 91 S.Ct. 65, 400 U.S. 806, 27 L.Ed.2d 38 (1970), the Court held:

> "... The purpose of Section 138(6) is to limit each voter to but a single choice for office ... a permissible State interest in assuring that each independent party is supported by 12,000 different *quailfied* voters ... " (Emphasis added).

The Appellee has tried to answer all of the major challenges to the Texas Election Code from the three Appellants' briefs filed.

Some challenges were made in which the Three-Judge District Court correctly found that the Appellants making such challenges either never did have or now lack the requisite "personal stake in the outcome" necessary to preserve jurisdiction in the Court. *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968); *Data Processing Serv. v. Camp*, 397 U.S. 150 (1969).

The challenge was made to the Texas Election Code as a whole because it does not provide absentee balloting for minority parties and independent candidates. This was answered by the Three-Judge District Court by *McDonald v. Board of Elections*, 394 U.S. 902, 807 (1969) holding that the traditional rational basis standard rather than the more exacting compelling interest test should be used in evaluating classification involving absentee ballot provisions.

Anyway, as shown above in *Flast v. Cohen, supra*, the only Appellant to make the challenge because of lack of absentee balloting was the American Party and they did not have the personal stake in the outcome since they were not on the ballot.

A group of people associated together for political purposes do not become an official party in Texas until statutory requirements are met. The law must have minimum guidelines and such a group must meet those minimum guidelines (such as having popular support sufficient to form a political party). The State has a necessary interest in setting those minimum guidelines for the formation of an officially recognized political party in Texas.

CONCLUSION

Few, if any grounds have been missed by the Appellants in their efforts to challenge the validity of Article 13.45(2) of the Texas Election Code, and certain related enactments, and basically all of the grounds find their inception in *Williams v. Rhodes*. However, the Appellants have completely failed to recognize or establish the essential criteria set forth by this landmark decision—the watchword of *Williams v. Rhodes* deals with the virtual impossibility of any small or new party being able to obtain ballot position as the constitutionally impermissible impediment to exercising one's voting or associational rights. This is wholly lacking in this case, or in connection with the statutes challenged.

In addition, while the Appellants may have ideas for changes in the Texas election laws that would possibly improve them or make them more attune to their desires and wishes, the fact that there may be better or more desirable ways to accomplish the State's duties and responsibility in the management of elections within the State, are not sufficient grounds to afford the drastic relief sought by Plaintiffs. As the Court stated in *Williams v. Rhodes*:

officially declared candidates on or before a certain date preceding an election. One may not play dog in a political manger by withholding his determination of candidacy until after party candidates are chosen by the primary process."

8. ARE THE PROVISIONS OF ARTICLE 13.50 OF THE TEXAS ELECTION CODE WHICH REQUIRE THAT THE APPLICATION OF AN INDEPENDENT CANDIDATE FOR DISTRICT OFFICE OBTAIN A CERTAIN PERCENT OF SIGNATURES OF THE TOTAL NUMBER WHO VOTED FOR GOVERNOR AT THE LAST GENERAL ELECTION IN THAT DISTRICT BUT NOT TO EXCEED 500 SIGNATURES, CONSTITUTIONALLY IMPERMISSIBLE?

Appellant, Laurel N. Dunn, independent candidate for the United States House of Representatives, representing himself and other independent candidates challenge Article 13.50 of the Texas Election Code which set out the requirements for independent candidates to get on the general election ballot.

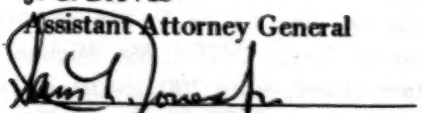
As clearly stated by the Three-Judge District Trial Court in their Memorandum Opinion rendered on September 15, 1972 (Page 33, Appendix A, Appellants' Jurisdictional Statement, No. 72-887 of this Court):

> "Other than a general allegation that the requirements are 'unduly burdensome' as to them, Plaintiffs present absolutely no factual basis in support of their claims. We reject outright Plaintiffs' argument that states can impose no additional election requirements other than those found in the United States Constitution." *Bullock v. Carter*, 405 U.S. at 145; *Jenness v. Fortson*, 403 U.S. at 442; *Williams v. Rhodes*, 393

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

J. C. DAVIS
Assistant Attorney General

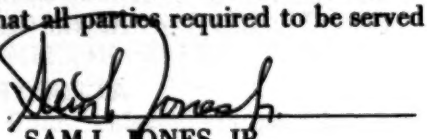


SAM L. JONES, JR.
Assistant Attorney General
Box 12548, Capitol Station
Austin, Texas 78711

ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I, Sam L. Jones, Jr., Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do hereby certify that a copy of the foregoing Brief has been forwarded by United States Mail, First Class, postage prepaid, and addressed as follows: Mrs. Gloria T. Svanas, 418 West Fourth Street, Odessa, Texas 79760; Mr. Michael Anthony Maness, 711 Main Street, Suite 700, Houston, Texas 77002; Mr. Gerald M. Birnberg, 2020 Southwest Freeway, Suite 302, Houston, Texas 77006; Mr. Laurel N. Dunn, 2811 Old Robinson Road, Waco, Texas 76706, and Mr. Robert W. Hainsworth. I certify that all parties required to be served are hereby served.



SAM L. JONES, JR.